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IN THE

# Supreme Court of the United States

October Term, 1988

STATE OF WYOMING, *Petitioner,*

v.

UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, *et al., Respondents.*

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING**

## BRIEF OF THE STATE OF NEW MEXICO AS AMICUS CURIAE

HAL STRATTON
*Attorney General*
State of New Mexico

MARTHA C. DABNEY*
VICKIE L. GABIN
*Special Assistant Attorneys General*
New Mexico State Engineer Office
Bataan Memorial Building, Room 101
Santa Fe, New Mexico 87503
(505) 827-6150

* *Counsel of Record*

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**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING**

## BRIEF OF THE STATE OF NEW MEXICO AS AMICUS CURIAE

The State of New Mexico as amicus curiae respectfully urges that this Court reconsider and reject the standard of "practicably irrigable acreage" (PIA) for the quantification of federal reserved water rights for Indians, and adopt a standard related to actual needs.

### INTEREST OF AMICUS

New Mexico is an arid state. The state has ten active stream adjudications involving the water rights of eighteen Indian

Tribes and Pueblos and approximately 20,000 non-Indian claimants.[1] New Mexico is thus deeply interested in the standard according to which those rights will be quantified. One of these adjudications, *State of New Mexico ex rel. Reynolds v. Lewis*, Chaves County Nos. 20294, 22600, Consolidated (1956) (the Mescalero case) has proceeded to trial and decision on the federal reserved water right claims brought by the United States on behalf of the Mescalero Apache Tribe. These claims were based on the PIA standard. The state district court found that the hypothetical irrigation schemes presented by the United States and the Tribe were not in fact economically feasible. The land proposed for farming was therefore not found to be

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[1] These cases are: *State of New Mexico ex rel. Reynolds v. Lewis*, Chaves County Nos. 20294, 22600, Consolidated (1956) (Mescalero Apache Tribe); *State of New Mexico ex rel. Reynolds v. Aamodt*, U.S. Dist. Ct. No. CIV-6639 M (1966) (Nambe Pueblo, San Ildefonso Pueblo, Pojoaque Pueblo, Tesuque Pueblo); *State of New Mexico ex rel. Reynolds v. Abbott*, U.S. Dist. Ct. No. CIV-7488 SC, CIV-8650 SC (1968) (San Juan Pueblo, Santa Clara Pueblo, San Ildefonso Pueblo); *State of New Mexico ex rel. Reynolds v. Abeyta*, U.S. Dist. Ct. No. CIV-7896 SC, CIV-7939 SC (1969) (Taos Pueblo); *State of New Mexico ex rel. Reynolds v. Aragon*, U.S. Dist. Ct. No. CIV-7941 SC (1969) (San Juan Pueblo, Jicarilla Apache Tribe); *Anaya v. Public Service Co.*, Santa Fe County No.43, 347 (1975) (Cochiti Pueblo); *State of New Mexico ex rel. Reynolds v. United States*, San Juan County No. 75-184 (1975) (Navajo Tribe, Jicarilla Apache Tribe, Ute Mountain Ute Tribe); *United States v. Abousleman*, U.S. Dist. Ct. No. CIV-83-1041 SC (1983) (Jemez Pueblo, Zia Pueblo, Santa Ana Pueblo); *State of New Mexico ex rel. Reynolds v. Kerr-Mcgee Corp.*, Cibola County Nos. CB-83-190-CV, CB-83-220-CV (1983) (Acoma Pueblo, Laguna Pueblo, Navajo Tribe); *City of Gallup v. United States*, McKinley County No. CV-84-164 (1984) (Zuni Pueblo).

practicably irrigable, and the court awarded *no* water under the PIA standard.[2] The decision of the court, rendered January 26, 1989, is attached as Appendix A. New Mexico wishes to give this Court the benefit of New Mexico's experience that the PIA standard is not the "feasible and fair" method of quantification envisioned by this Court in *Arizona v. California*, 373 U.S. 546, 601 (1963). Rather, the PIA standard leads to the promotion of wildly speculative schemes, and can result in an award of no water.

The most serious flaw in the PIA standard is that the standard bears no relation to Indian needs, but only to the character of the land on a reservation. This means that the amount of water awarded may be out of any proportion to the efficient use of that water by the Indians in the context of the local economy. New Mexico's long established water law system, which has been designed to encourage water to flow to its most economically efficient use, will be bypassed by awarding water on some basis other than actual need. This is in conflict with this Court's repeated recognition of Congress' deference to state water law. *California v. United States*, 438 U.S. 645 (1978); *United States v. New Mexico*, 438 U.S. 696 (1978).

When a tribe is awarded water in excess of its needs, its interest is no longer in the water itself, but in water as a means to wealth. The doctrine of federal reserved water rights should not be used as a pretext for awarding a source of wealth; it should be addressed to an actual need for water. Water looked upon as a means to wealth rather than as a reservation resource

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[2] The court instead awarded an amount of water which recognized existing Indian uses, and also was, in the court's view, enough water to permit the Tribe to be self-sufficient in the future. Appendix A, Conclusions of Law No. 23, 24.

for actual beneficial use subverts the most fundamental principle of western water law, that "[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water." N.M. Const. Art. XVI, §3. *See also* Ariz. Const. Art. XVII §2; Idaho Const. Art. XV, §3; Colo. Const. Art. XVI, §3; Utah Const. Art. XVII, §1; Wyo. Const. Art. VIII, §3.

Finally, New Mexico's interest lies not only in preserving a workable and efficient structure of water law, but also in protecting relations among peoples within the state. The claims made pursuant to PIA, which without any basis in need threaten a "gallon-for-gallon" uncompensated reduction in non-Indian rights, *United States v. New Mexico, supra*, have created a damaging hostility between Indians and non-Indians. Following the reserved right claims in the Mescalero case, for example, there has been great bitterness at the United States' and Tribe's perceived attempt to preempt non-Indian rights without addressing the Mescaleros' water requirements. New Mexico's interest in preserving harmony among its peoples is best served by a quantification standard which addresses a real need for water.

## SUMMARY OF ARGUMENT

The PIA standard of quantification of federal reserved water rights for Indians should be rejected both as a matter of policy and law. As a matter of policy, the PIA standard is disastrous. As applied, it is susceptible to abuse. Advanced engineering techniques, together with manipulations of data, make it possible to claim that huge amounts of lands are, under some speculative factual analysis, "practicably" irrigable. If the claim is successful, it can result in an award which far exceeds Indian needs. If the claim is not successful as in the Mescalero case, or if the reservation is simply not suitable for farming,

a tribe could get no water, or very little water. Furthermore, the PIA standard, because it is based on agriculture, may not reflect a tribe's own economic choices for the use of its land. The shortcomings of PIA arise from adhering to the historical question of the specific purpose of each reservation, rather than recognizing that reservations have the more general purpose of self-sufficiency. That purpose is served by a quantification standard addressed to actual need.

As a matter of law, the PIA standard has not fulfilled the expectation that it would provide a concrete and fair method of quantifying federal reserved water rights. Further, PIA stands in sharp conflict with this Court's recognition that these rights must be quantified in a way that is closely tailored to the needs of the Indian people. In the Mescalero case, a state district court applying federal law rejected on a factual basis the United States' and Mescalero Tribe's evidence supporting their PIA claim. The court adopted a reasonable measure of future Indian needs taken from evidence of projected population. That procedure is equitable, is an ordinary approach in determining water needs and avoids the evils of the PIA standard. This, or some similarly reasonable quantification method, should be adopted by this Court.

## ARGUMENT

### I. THE PIA STANDARD IS SUBJECT TO ABUSES WHICH UNDERMINE THE INTENT OF THIS COURT

#### A. The PIA Standard as Applied is Neither Objective Nor Fair.

By its very nature, a PIA case is susceptible to abuses. A tribe faces its single opportunity to claim federal reserved water rights for future water needs, but must use a standard which does not explicitly address those needs. Thus, the temptation

is simply to acquire as much water as the PIA standard allows. To do so, the United States and tribes proffer evidence in support of hypothetical irrigation schemes. The water award then depends on whether these projects would be economicallv feasible, if built.[3] The nature of the economic feasibility analysis is so speculative, and the stakes are so high, that the objectivity of the procedure is easily lost.

When a PIA claim was made in the Mescalero case, the United States acting on behalf of the Tribe and the Tribe itself performed many studies to determine how much acreage on the reservation is irrigable. For one project, the United States and the Tribe proposed a trans-mountain diversion, where a tunnel drilled through a mountain would deliver water to acreage in another basin. The enormous capital costs of this project were to be offset by benefits realized by growing profitable specialty crops, and attaining yields which exceed those attained by commercial producers. Appendix A, Finding of Fact No. 37. Additionally, the United States' and Tribe's economic analysis deviated from standard economic procedures, biasing their benefit-cost analysis in favor of the economic feasibility of the project. Appendix A, Finding of Fact No. 28. This process was by no means the relatively simple, objective inquiry presumably envisioned by the Special Master in *Arizona v. California, supra*, the case which first set forth the PIA standard as "feasible and fair." *Id.* at 601.

Because the projects in Mescalero, as in any PIA case, are invented solely to justify as large an award of water as possible, the United States and the tribes have no incentive to be real-

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[3] PIA has been equated with economic feasibility. February 22, 1982 Special Master Report at 94, *overruled on other grounds, Arizona v. California*, 460 U.S. 605 (1983). It is on the economic feasibility of a proposed project that a PIA case ordinarily turns.

istic or detailed in their planning. Opposing parties are in the intolerable position of attempting to refute a sketchily-drawn hypothetical. The trial court is led into a fantasy world of the possible in the opinion of one expert, as opposed to another possibility in the opinion of another expert. This cannot be the quantification procedure contemplated in *Arizona v. California, supra* at 601, where the Court rejected an alternative standard as calling for guesswork. Rather than reducing the guesswork in the quantification of Indian water rights, the PIA standard, as applied, redoubles it.

B. The PIA Standard Fails Because it is Not Related to Need.

PIA is a mechanical formula, based solely on engineering and economic factors. A PIA analysis could result in a huge water award for a large, fertile reservation with a small population base. Or, a large tribe of Indians living on infertile lands could conceivably end up with a reserved water right insufficient for their present requirements, let alone those of future generations. In the Mescalero case, the United States and Tribe failed to demonstrate the economic feasibility of their projects, and were awarded *nothing* under PIA. Too much water, too little water, or no water at all--any of these results defeats the intent of the reserved rights doctrine as interpreted by this Court. *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658 (1979).

Neither are the Indians helped by being asked to engage in the meaningless academic exercise of planning irrigation projects which may be inappropriate for the reservation. The Mescaleros, for example, have begun to exploit the recreation potential of their reservation. Under the PIA standard, however, the Mescaleros could not successfully base their claims

on their recreation needs. *See* Appendix A, Finding of Fact No. 32, Conclusion of Law No. 36. By contrast, a sensible way to quantify reserved rights would take into account some notion of the most appropriate use of scarce water resources on the reservation in the light of all of a tribe's resources and its place in the larger economic world. The PIA standard promotes an elaborate charade that does not accomplish this goal. PIA looks at the characteristics of the land; a realistic standard would look at the needs of the Indian people.

The PIA standard's failure to address the real needs of the Indian people arises from the untenable assumption that a federal reserved right for Indian tribes must be narrowly focused to the specific activities originally intended by the federal government. The historical purposes for confining Indians to reservations were many: protecting them from non-Indians and vice versa; allowing for western expansionism; "civilizing" the Indians and ultimately integrating them into mainstream society; as well as the agricultural or grazing purposes sometimes specifically enunciated.[4] To single out any one of these purposes, such as agriculture, ignores the broader purpose of a reservation created for a people. The federal reserved rights doctrine, correctly construed, should address that broader purpose--to make the reservation a viable place for people to live, a home. As the Mescalero court recognized, "[a] purpose for the reservation of water rights for the Mescalero Apache Tribe was to make the Tribe self-sufficient." Appendix A, Conclusion of Law No. 13.

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[4] In the Mescalero case, it would have been particularly inappropriate to tie a water rights award to a specific historic purpose. None of the five Executive Orders setting aside the Mescalero reservation explicitly stated a purpose for the reservation. The court was provided with extensive historic testimony, and asked to impute purposes of agriculture or grazing.

Recognizing that self-sufficiency is the purpose of the federal reserved right doctrine for Indian tribes accomplishes the goal of that doctrine in two ways. First, it permits awards for actual present needs and future uses even if those potential uses were not specifically articulated when the reservation was created. Second, a standard of water rights quantification which addresses self-sufficiency is a straightforward approach to assessing actual Indian need. Such an approach obviates the problem inherent in the PIA standard of a water rights award which could greatly exceed or fall far short of the Indians' actual requirements.

## II. FEDERAL RESERVED INDIAN WATER RIGHTS SHOULD BE QUANTIFIED BY THE AMOUNT OF WATER NEEDED FOR A MODERATE LIVING

Because the PIA standard as applied permits awards in excess of need, it falls outside of this Court's clear pronouncements on how federal reserved water rights should be quantified. In *Cappaert v. United States*, 426 U.S. 128 (1976), for example, the Court, after noting that the implied reservation of water rights doctrine "applies to Indian reservations and other federal enclaves," stressed that the doctrine "reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." Further, the quantification of reserved water rights must be "tailored . . . to minimal need." *Id.* at 138, 141. Subsequently in *United States v. New Mexico, supra*, the Court elaborated on these limitations. The Court reemphasized and refined the theme that the implied reservation doctrine measures water rights by the minimum necessary to fulfill the reservation's purposes, stating:

> Each time this Court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the

> specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated.
>
> *Id.* at 700.

One year later, in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, supra* at 686, the Court concluded:

> As in *Arizona v. California* and its predecessor cases, the central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood--that is to say, a moderate standard of living.

*Arizona v. California, supra*, is the source of the PIA standard. The Court's reference in *Washington* to the *Arizona v. California* case, therefore, indicates what the Court must have intended by the PIA standard. The Court must have intended that the standard result in a water rights award which would provide the Indians with a moderate standard of living. The PIA standard as applied, however, defeats the Court's intent, as it permits awards which bear no relation to the standard of living of the tribe, but only to the characteristics of the reservation. The PIA standard, because it fails in practice to address a real need for water, should be rejected by the Court.

## III. ALTERNATIVE STANDARDS OF QUANTIFICATION EXIST WHICH ARE WORKABLE AND FAIR

The process of determining need is neither unduly difficult nor unusual in the west. In the Mescalero case, for example, the court recognized current uses, and also awarded water for future uses based on a projected population figure. Appendix A, Conclusions of Law No. 23, 24. This procedure is commonly used by the New Mexico State Engineer in acting on water right applications for municipalities in the state. Additionally, in at least one administrative proceeding, the state produced an econometric model of a large southwestern city in order to determine that city's future needs. *In the Matter of the Applications of the City of El Paso*, HU-12 through HU-71, LRG-92 through LRG-357 (1980). Another option is to quantify water rights in connection with a tribe's own choices for self-sufficiency. In the Mescalero case the state suggested that, because the Mescaleros' chief economic activity is recreational development, a proper quantification method might be an award of water for those uses. Such an award would of course be capped by actual needs.

All of these possibilities are reasonable, and would tie a water award to a tribe's real needs in accordance with the decisions of this Court. New Mexico urges that these or other workable standards be applied in quantifying federal reserved water rights for Indians.

## CONCLUSION

For the foregoing reasons, New Mexico requests that the Court reject the PIA standard, and adopt a standard related to need.

Respectfully submitted,

HAL STRATTON
*Attorney General*
State of New Mexico

MARTHA C. DABNEY *
VICKIE L. GABIN
*Special Assistant Attorneys General*
New Mexico State Engineer Office
Bataan Memorial Building, Room 101
Santa Fe, New Mexico 87503
(505) 827-6150

**Counsel of Record*

March 9, 1989

APPENDIX A

FIFTH JUDICIAL DISTRICT COURT
COUNTY OF CHAVES
STATE OF NEW MEXICO

STATE OF NEW MEXICO, EX REL.
S.E. REYNOLDS, State Engineer,
and PECOS VALLEY ARTESIAN
CONSERVANCY DISTRICT,

Plaintiffs,

v.

L.T. LEWIS, et al.,
UNITED STATES OF AMERICA,

Defendants,

MESCALERO APACHE TRIBE,

Defendant-Intervenor

and

STATE OF NEW MEXICO, ex rel.
S.E. REYNOLDS, State Engineer,
and PECOS VALLEY ARTESIAN
CONSERVANCY DISTRICT,

Plaintiffs,

v.

HAGERMAN CANAL CO., et al.,

Defendants.

Nos. 20294 and 22600
CONSOLIDATED

RIO HONDO SECTION
Mescalero Section

DECISION OF THE COURT

## FINDINGS OF FACT

1. The aboriginal title of the Mescalero Apache Tribe remains today in the present Reservation lands.

2. There is no evidence of Mescalero Apache Tribe aboriginal use of water.

3. On July 1, 1852, the United States, the Mescalero Apache Indian Tribe, and others entered into a treaty which was ratified by the United States Senate in 1853.

4. This 1852 treaty was a peace and amity treaty. The treaty expressly did not designate a reservation of land.

5. Numerous actions of federal government officials between 1852 and 1873 established that the 1852 treaty was not intended to be a treaty of reservation. There were suggestions that the Mescalero Apaches be placed on reservations in areas outside of the White and Sacramento Mountains. The reservations included the Fort Thorne Reservation, and reservations on the Rio Felix, Gila River, and Rio Penasco. The Bosque Redondo was established as a permanent reservation for the Mescaleros by Executive Order dated January 15, 1864, and subsequently abandoned and restored to the public domain.

6. The Mescalero Apache Reservation was created by five executive orders beginning in 1873: The Executive Order of May 29, 1873; the Executive Order of February 4, 1874; the Executive Order of October 20, 1875; the Executive Order of May 19, 1882; and the Executive Order of March 24, 1883.

7. The first Executive Order of May 29, 1873, withdrew land from the public domain for the purpose of providing arable land and grazing lands for a Mescalero Apache Reservation. When the reservation boundaries were originally designated in 1873, there was a specific intent on the part of federal officials to protect the agricultural economy and water supply of non-

Indian farmers who had settled the arable lands along the Rio Ruidoso valleys prior to 1873. In 1873, the Rio Bonito, Rio Hondo and Rio Ruidoso valleys were occupied by settlers. These lands and the appurtenant water appropriated by those settlers were not available for a reservation. In response to these Indian/non-Indian land use conflicts, all of the irrigated lands along Rio Ruidoso were expressly excluded from the 1873 Executive Order reservation.

8. None of the arable lands of the United States' and Mescalero Apache Tribes' proposed projects lie within the 1873 Executive Order Reservation boundaries.

9. On February 8, 1874, an Executive Order withdrew land from the public domain for the purpose of adding arable land and grazing land to the reservation. All of the arable lands along the Rio Ruidoso were excluded from the reservation by the 1874 Executive Order to protect the agricultural economy and water supply of non-Indian farmers who had settled the arable land along the Rio Ruidoso prior to 1873.

10. Only small amounts of arable lands of the United States' and Mescalero Apache Tribes' proposed projects are within the 1874 Executive Order boundaries.

11. On October 20, 1875, an Executive Order withdrew land from the public domain for the purpose of providing the reservation with grazing acreage. A portion of the Rio Tularosa Valley that had been settled by non-Indians was inadvertently included within the reservation. Despite recommendations to the contrary, an express decision was made not to withdraw arable lands along the Rio Ruidoso settled by non-Indians for the use of the Indian Reservation in the 1875 Executive Order. There were no subsequent attempts to include irrigable lands along the Rio Ruidoso in the reservation.

12. On May 19, 1882, an Executive Order withdrew land from the public domain for the purpose of providing grazing land to the reservation. Contiguous unsettled arable land along the Rio Penasco was passed up in favor of additional grazing acreage. Two major areas of arable land were deleted from the reservation and returned to the public domain by the 1882 Executive Order. In response to non-Indian mining interests, the arable land along the Rio Bonito that was reserved by the 1873 and 1874 Executive Orders was deleted from the reservation and returned to the public domain. The arable land in the Rio Tularosa Valley that had been reserved by the 1875 Executive Order was deleted from the reservation and returned to the public domain because it was occupied by non-Indian settlers prior to 1875.

13. On March 24, 1883, an Executive Order withdrew land from the public domain for the purpose of providing more arable land for the reservation. Specifically, this boundary adjustment was made to correct a prior surveying error so that the Indian farms at Three Rivers would be included in the reservation. These farms had been unintentionally excluded by the 1882 Executive Order.

14. Approximately ten percent of the Rio Ruidoso watershed (from its headwaters to its confluence with the Rio Bonito) is located within the boundaries of the Mescalero Apache Reservation.

15. The vast majority of the lands proposed for the Rinconada and Pajarita Projects are in the 1875 Executive Order land withdrawal.

16. The lands identified by the United States and Tribe for irrigation in the Pajarita unit are arable and irrigable.

17. The lands identified by the United States and Tribe in the Rinconada area for irrigation are arable.

18. The lands identified by the United States and Tribe for irrigation of a golf course at Carrizo are arable and irrigable.

19 There was more land in irrigation along the Rio Ruidoso in 1873 than is irrigated today. Currently, there is an insufficient surface flow in the Rio Ruidoso to meet existing irrigation needs for pre-1873 priorities. The Rio Ruidoso, the Rio Hondo, and the Rio Bonito are water short as evidenced by the reliance on supplemental wells in the stream system. During critical irrigation months, the river stream is extremely water short.

20. There is an inadequate water supply available for the "included" acres of the Rinconada project, even assuming that the entire surface flow of the Rio Ruidoso at the boundary of the reservation is available for diversion and is not subject to appropriation by downstream users with prior rights.

21. Rather than assessing the lack of water during critical irrigation months, the United States and Tribe analyze shortages on an annual average basis. In conducting an operational analysis, neither yearly nor monthly figures reveal the usable divertable flows. Analysis of water availability based upon annual or monthly averages disguises flood flows and overstates actual water availability. The most accurate analysis is based on daily flows. There is no "average" surface stream flow in the Rio Ruidoso as a matter of fact.

22. No water supply exists for either the "omitted acres" of the Rinconada/Carrizo unit or the "omitted acres" of the Pajarita unit.

23. The existing water uses of the Mescalero Apache Tribe is 1,372.4 acre feet diversion per year.

24. The amount of water needed from the Rio Hondo stream system to meet the future domestic, recreational, and

other non-agricultural needs of the Tribe is 950 acre feet diversion per year.

25. The proposed diversion by the United States and Tribe of surface water out of the Rio Ruidoso watershed would upset the hydrologic balance of the Rio Ruidoso stream system, reducing the amount of surface water available in the stream to recharge the alluvium of the stream bed and/or to enter the hydrological stream of the Roswell Basin as underflow or floodflow.

26. In applying a benefit-cost analysis to quantify federal reserved water rights, it is necessary to follow commonly accepted, standard economic procedures. When a benefit-cost analysis is used to establish property rights in water rights litigation, the analysis is subject to distortion and bias.

27. Every benefit-cost analysis has three distinguishing characteristics: 1) all benefits and costs are included regardless of to whom they accrue; 2) benefits are measured by consumer willingness to pay; 3) costs are measured by opportunity costs, which may differ from project expenditures.

28. No special rules apply to economic feasibility analysis for determining whether a proposed Indian water project will reflect a benefit-cost ratio greater than one. In deviating from standard economic procedures, the United States and Tribe biased their benefit cost analysis in favor of economic feasibility of the project.

29. In an economic feasibility analysis, particularly in the field of water resources, there are impacts that go beyond the immediate investing entity and the beneficiaries for whom they are designed. Thus, an economic feasibility analysis should not be restricted by political boundaries. The United States and Tribe claim benefits for products moved off the reservation, but fail to consider costs that accrue beyond the reservation boun-

dary. This approach biases the outcome of the analysis in favor of economic feasibility.

30. An economic analysis is based on the concept of opportunity cost. The foregone benefits of users that would be incurred are relevant external opportunity costs that should be considered under a properly constituted economic feasibility study. The United States and Tribe did not consider these costs.

31. The economic analyses submitted by the United States and Tribe omit numerous off-reservation economic costs, including lost agricultural production along the Lower Rio Ruidoso, fishery losses, property devaluation, and the costs of constructing alternative municipal water supplies.

32. With respect to the Rinconada Project, the United States and Tribe analyzed capital costs as if the project were to be developed primarily for recreation purposes. They attributed all costs to recreation, except for incremental costs essential for irrigation. They assigned approximately 75% of the water costs on the Rinconada to recreation even though 68% of the water is to be utilized for agriculture. The result of this division of costs between recreation and agriculture, as calculated by the United States and Tribe makes the cost per acre of agricultural development appear lower than it would be. It is also the equivalent of using recreational benefits to justify a reserved rights award under a practicable irrigable acreage analysis. This is improper, because each component of a project must be evaluated on its own merits, and costs must be assigned proportionately.

33. The United States' and Tribe's analysis of the Rinconada project in effect rejects practicably irrigable acreage as the basis of their claims. It substitutes recreation as the primary purpose of the proposed project in order to create a justifiable capital cost for agriculture.

34. Under generally accepted standards for economic feasibility analyses, both the Rinconada and Pajarita developments proposed by the United States and Tribe are infeasible. Even making all favorable assumptions, and not including off-reservation costs, the projects would not return sufficient funds to pay for their construction, maintenance, replacement and operation costs.

35. The United States' and Tribe's reliance on specialty crops for both projects does not comport with appropriate economic procedures which consider the proper ratio of specialty to basic crops.

36. The United States' and Tribe's analysis of markets for specialty crops was inadequate and failed to follow generally accepted evaluation criteria. Given the production conditions existing on the reservation, including water supply issues, the Mescalero Reservation has no comparative market advantage over existing supplying regions.

37. The United States' and Tribe's methods of calculating crop yields for both projects do not conform to appropriate economic procedures. Thus, the proposed crop yields are greatly overstated and unrealistic compared to what other commercial producers realize.

38. The physical constraints of the terrain, the geographical location of the Reservation, and the variety and selection of crops dictate high quality, top level management. The United States and Tribe failed to budget sufficiently for this necessity.

39. The United States and Tribe failed to specifically or adequately quantify the risks inherent in both projects related to weather, markets, labor, insects, disease, and all other risks that go along with agricultural production.

40. The United States and Tribe have overstated accomplishment rates and understated costs of machinery equipment.

41. Crop budgets must include factors such as storage, transportation, quality adjustments, supply and demand, seasonal price differences, and market structure in order to define accurately proposed prices and production costs. The United States and Tribe failed to include all of these factors in their crop budgets for both projects.

42. The accounting system used by the United States and Tribe does not totally account for the costs of establishment and maintenance of the various crops in their net benefit analyses for the projects.

43. Sound economic theory requires a detailed analysis of the labor cost component in project development, and limits the benefits which can be claimed for labor. The United States and Tribe failed to perform that analysis and therefore understated the costs for both projects.

44. The Rinconada project as proposed is undercosted by almost 12 million dollars. The United States' and Tribe's analysis of the water delivery system for the unit is an incomplete "reconnaissance-level" study. It is inadequate to permit a proper assessment of the project feasibility as relates to the tunnels, pipelines and dams and pumpback system designed to supply water to the project.

45. The Mescalero Apache Tribe has successfully diversified its non-agricultural economic interests and pursuits. The continued prosperity of the Tribe and a successful economic utilization of its lands are not dependent on the proposed agricultural development in the Pajarita and Rinconada projects.

## CONCLUSIONS OF LAW

1. This Court has personal jurisdiction over all claimants to the use of water of the Pecos River System within the territorial boundaries of the State of New Mexico.

2. The Court has subject matter jurisdiction over this case.

3. All claimants with rights to the use of water of the Pecos River System have standing to contest and participate in hearings involving the claims for rights to the use of water filed by the United States on behalf of the Mescalero Apache Tribe.

4. Notice of the opportunity to contest the claims to the use of water filed by the United States on behalf of the Mescalero Apache Tribe, present evidence and be heard was provided by personal service and notice of publication to all claimants to the use of water of the Pecos River System within the territorial boundaries of the State of New Mexico.

5. The judgment of this Court is final and binding on the State of New Mexico and all claimants to the use of the waters of the Pecos River System within the State of New Mexico.

6. The United States established on behalf of the Mescalero Apache Tribe a right to the use of water from the surface water and related groundwater of the Rio Hondo and its tributaries for present and future uses of the Mescalero Apache Tribe.

7. The Mescalero Apache Tribe holds aboriginal title to its present-day Reservation.

8. Aboriginal Indian title derives from exclusive and prolonged occupancy and use of a resource. There is no aboriginal priority date under which federal reserved water rights for the Mescaleros can attach.

9. Aboriginal title is not a property right, but provides only a right of occupancy as against the United States until such time as the right is extinguished.

10. Congress has the right and power to extinguish Indian aboriginal title.

11. All waters arising on the public domain out of which the Mescalero Apache Reservation was first designated in 1873 were severed from the public domain by acts of Congress beginning in 1866.

12. The United States holds title in trust for the Mescalero Apache Tribe to the quantity of water awarded.

13. A purpose for the reservation of water rights for the Mescalero Apache Tribe was to make the Tribe self-sufficient.

14. Self-sufficiency of the Mescalero Apache Tribe on a reduced land base or reserve requires development of present and future uses of available water.

15. A purpose of reserving water rights for the Mescalero Apache Tribe was to provide a permanent homeland for them.

16. A permanent homeland for the Mescalero Apache Tribe requires development of present and future use of water.

17. A permanent homeland for the Mescalero Apache Tribe requires water for recreation, agriculture, domestic, stock, commercial, industrial and other uses for the "arts of civilization."

18. Self-sufficiency of the Mescalero Apache Tribe on their Reservation requires multiple and varied uses of water for recreation, agriculture, domestic, stock, commercial, industrial and other uses for the "arts of civilization."

19. Equitable Estoppel is not an appropriate principle in the adjudication of the Mescalero Apache Tribe rights to the use of water.

20. Balancing of equities is not to be considered in the quantification of the Mescalero Apache Tribe rights to the use of water.

21. Quantification of the rights of the Mescalero Apache Tribe to the use of water is governed exclusively by federal law.

22. Practicable irrigable acreage is the appropriate method of quantification of the future agricultural water right for the Mescalero Apache Tribe.

23. The 1372.4 acre feet per year for existing uses of water on the Mescalero Apache Reservation is necessary to meet the purposes of the Mescalero Apache Reservation and is a valid right.

24. The 950 acre feet of water for projected future uses except agricultural uses is necessary to meet the purposes of the Mescalero Apache Reservation and is a valid right.

25. Priority of the right to the use of water by the Mescalero Apache Tribe is governed exclusively by federal law.

26. The 1852 Treaty was one of peace and amity between the United States and the various tribes which constituted the Apache Nation. In express terms it did not establish a reservation for the Mescalero Apache Tribe. As a matter of law, the treaty cannot be used as the basis for any federal reserved water right.

27. The Mescalero Apache Reservation was first established by the federal government in the Executive Order of May 29, 1873, which reserved specific lands for the Mescaleros. Until that time, no water was impliedly reserved for the Mescalero Apache Reservation.

28. The Winters or federal water rights doctrine stands for the proposition that when the federal government withdraws its land from the public domain and reserves it for a federal purpose, the government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. Under the Winters Doctrine,

the federal government, not the Indians, implicitly reserves the water rights. Federal reserved rights can arise only in water unappropriated as of the date of the withdrawal of lands from the public domain.

29. The priority of lands withdrawn by Executive Order is the date of the reservation; if there are successive withdrawals of land, there are successive priority dates relating to the specific lands withdrawn.

30. Federal reserved water rights can be implied only to the extent needed to satisfy the contemporaneous purposes for which lands were withdrawn; if there are successive withdrawals, reserved water rights can be implied only to the extent needed to satisfy the purposes of each withdrawal.

31. When there is an expressed intent to exclude land and appurtenant water from a reservation a contrary intent cannot be implied.

32. Federal reserved rights can arise only in water unappropriated as of the date of the withdrawal of lands from the public domain.

33. The method of quantifying federal reserved rights is not necessarily the same for all reservations.

34. If practicably irrigable acreage method of quantification is appropriate in this case, the United States and Tribe have failed to sustain their burden of proof. The proposed Rinconada and Pajarita projects are not economically feasible, nor is there sufficient water available to supply the proposed Rinconada project.

35. A proper benefit-cost analysis required to determine practicably irrigable acreage takes into account all of the benefits and all of the costs regardless of the costs to whom they

accrue. Such an analysis must be conducted according to generally accepted economic principles which are consistently applied.

36. Recreation is not a permissible use under a practicably irrigable acreage analysis.

37. Recreation is a permissible use, but the benefits therefrom cannot be used to bolster the economic feasibility analysis for an agricultural project.

38. Once quantified, the water rights awarded may be put to any use.

/s/ LaFel E. Oman

District Judge Pro Tempore
P.O. Box 8398
Santa Fe, NM 87504